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No. 95-1811

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ALEXANDER STORER, JR.; DOROTHY J. STORER, his wife,

Petitioners,

vs.

CITY OF OCEAN CITY, A Municipal Corporation in the County of Cape May, State of New Jersey,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court exercise its discretion in granting a Writ of Certiorari when the Opinion of the Third Circuit is not in conflict with any decision of another United States Court of Appeals ruling and the legal issue asserted by Petitioners has been fully addressed by the United States Supreme Court?

2. Was the Third Circuit correct in applying the "parcel as a whole" rule of law set out in the leading case of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)?

3. Was the Th d Circuit correct in its factual finding that the subject property was clearly part of a "whole parcel" consisting of a beachfront duplex of substantial value and vacant land, requiring affirmation of the jury verdict?

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STATEMENT OF JURISDICTION

Petitioners bring this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1), requesting review of the Opinion of the Third Circuit entered as a judgment on February 6,1996.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves application of the Fifth and Fourteenth Amendments to the United States Constitution as set out by Petitioner.

STATEMENT OF THE CASE

The following facts were stipulated at the trial of this matter. In April of 1961 Petitioners Dorothy and Alexander Storer purchased two lots in Ocean City, Cape May Count, New Jersey, now known as Lot 1, Block 3000 which was vacant land and Lot 9, Block 3001, which was improved with a duplex. The total purchase price was $50,000. Petitioners also own Lots 44 and 51, Block 61121 which are vacated street beds of Wesley Avenue adjacent to Lots 1 and 9.

A portion of Petitioners' property — Lot 1 and the vacated street ends — lies within the "Beach and Dune Zone" of Ordinance 88-27 ("Zoning and Land Development Ordinance") which was adopted in June of 1988. This Ordinance allows only passive recreational use and all building and development is prohibited. The stated purposes of the Ordinance are (a) to regulate the use of beach and dunes as a flood preventative land form in order to secure safety from flood and other natural disasters; (b) to provide sufficient space for recreational uses in order to meet the needs of all New Jersey citizens, and (c) to promote the conservation of a valuable natural resource. (*See* Appendix C to Petition, pages 16a-17a).

Supplementing these stipulations, the following facts were adduced at trial. Petitioners came to Ocean City in February of 1961 from their home in Collingswood New Jersey, looking to purchase a duplex where they could rent one apartment and keep the other for a family vacation home (Transcript 3/13/94 page 40-17). Petitioners were acquainted with a local realtor, Robert Monihan (since deceased), who had previously rented apartments to them (Transcript 3/13/94 page 41-4).

Petitioners initially chose Lot 9 Block 3001 which was improved with a duplex, and agreed to pay $40,000 (Transcript 3/13/94 page 41-18). At that time Mr. Monihan showed Petitioners the lot directly east of the duplex, which was "ocean front" (Transcript 3/13/94 page 34-23). Lot 1 consisted of sand dunes and a bulkhead, admittedly to provide protection from ocean flooding (Transcript 3/13/94 page 110). The realtor told Petitioners that Wesley Avenue, which was an unimproved paper street between Lots 9 and 1, would be improved "in the near future", giving street access to build on Lot 1 (Transcript 3/13/94 page 43-23 to 44-3).

Petitioners thus purchased Lot 1 for $10,000 (Transcript 3/13/94 page 45-6). The conveyance was made by one deed, for a total purchase price of $50,000 (Transcript 3/13/94 page 86-13; Deed entered into evidence as P1). For about eight years subsequent, Petitioners rented out both the top and bottom duplex apartments (Transcript 3/13/94 page 73-5) and then began using the second floor apartment as a family vacation home. The rental income on the bottom floor apartment has been approximately **$13,000 per year** (Transcript 3/13/94 page 75-22).

Between 1961 and 1989 (twenty eight years) Petitioners did not consult one city official, architect, engineer, attorney, or other professional regarding (1) the "promised" vacation of

Wesley Avenue; (2) development of Lot 1 in any way (Transcript 3/13/94 page 70; Transcript 3/14/94 page 36-12); or (3) whether Petitioners could cut through the bulkhead on Lot 1 to build a duplex (Transcript 3/14/94 page 44-19). Petitioners retired in 1984, moving permanently to Florida (Transcript 3/14/94 page 37-14). Through an Ocean City Ordinance passed in 1971, the street end at 30th Street (where the duplex is located) was vacated, vesting title in plaintiffs of approximately another 6400 square feet (Transcript 3/14/94 page 48-23). Petitioners claim that when they became aware of this vacation in 1989 they determined to sue the City for "taking" of Lot 1 (Transcript 3/14/94 page 49 to 51). Dr. Storer admitted that had the City not vacated 30th Street, which action he believed provided access to Lot 1, the underlying lawsuit would never have been filed (Transcript 3/14/94 page 53-10).

Dr. Storer testified that they were looking for "ocean front" property and thought that the duplex shown them on Lot 9 was "beach front" (Transcript 3/13/94 page 29-4). The duplex on Lot 9 satisfied Petitioners' criteria for a beach front property (Transcript 3/13/94 page 35-4). Dr. Storer was looking for the "propensities" available from an "ocean front" lot, such as direct access to the beach, the ocean, the view, etc. (Transcript 3/13/94 page 29 to 30). Dr. Storer admitted that even though they have never been able to build on Lot 1, the "beach front" duplex on Lot 9 provides these same amenities (Transcript 3/13/94 page 30-20). Dr. Storer testified that Lot 9 with the improved duplex, was valued at $794,000 (3/14/94 page 31-25).

On cross examination, Dr. Storer admitted that he could still see the ocean from his duplex on Lot 9, enjoy the sun and the breeze, unobstructed by any building, thus preserving the value of Lot 9 as an oceanfront property. (Transcript 3/14/94 page 59:21 to page 61:23). Although he could "physically" see the ocean from Lot 9, Dr. Storer explained that emotionally "all I can

do is look across a lot that's been taken from us that is a very valuable property, and that's all I can see when I look out across there" (Transcript 3/14/94 page 60:18). Dr Storer stated that he cannot go to the beach "without thinking of what we're losing from the actions that the City has taken" (Transcript 3/14/94 page 61:17).

Based on this evidence, the jury returned a verdict of no cause for action, having found initially that Petitioners had not shown any "reasonable investment backed expectations" in the original purchase of Lot 1. Petitioners then moved for a new trial based on "the rapid decision of the jury, in light of the overwhelming evidence" (Petitioners' Brief in Support of Motion for New Trial). When this post verdict motion was denied and judgment entered, Petitioners appealed to the Third Circuit, arguing in part that the jury instructions were erroneous, although it was undisputed that the Court held a lengthy jury charge conference, and Petitioners' counsel never objected to the Charge or Jury Verdict Form.

The Third Circuit affirmed the verdict, finding that although the District Court's jury instructions were "flawed" (Appendix A page 2a), they were not sufficiently prejudicial under these factual circumstances to give rise to plain error (**"The plain error doctrine is not so permissive as to permit us to reverse and remand this case on the present facts"; Appendix A page 41**). The Third Circuit Court engaged in a detailed factual analysis and found that **"(t)he dispositive issue here should have been whether the 'relevant parcel' consisted of Lot 1 alone or Lots 1 and 9 together"** (Appendix A page 6a-7a). Applying the rule of law set out in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Third Circuit found that the "whole parcel" analysis precluded reversal of the jury verdict:

> **The Court's decision in *Penn Central* provides strong authority for defendant Ocean City on the dispositive relevant parcel issue. In light of this, we cannot say with any confidence that the Storers would have prevailed on their inverse condemnation claim if the jury had been instructed properly. There is an excellent chance that plaintiffs still would have lost. Although it is possible that the Storers could have prevailed if the jury had been instructed properly (or if trial counsel had objected to the erroneous instructions and had them corrected), such highly speculative tort recoveries do not fall within the purview of the plain error rule.**

(Appendix A page 12a).

Thus the Third Circuit's analysis of the case was completely focused on its independent factual findings based on the evidence before the jury. Petitioner relies almost exclusively on a reference to a footnote/dictum in the case of *Lucas v. So. Carolina Coastal Council,* 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). Respondent respectfully submits that there is no basis for granting a Writ of Certiorari in this case.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS FAIL TO PROVIDE ANY COMPELLING REASONS REQUIRING THIS COURT'S REVIEW OF THE THIRD CIRCUIT'S FACTUAL AND LEGAL ANALYSIS OF THE JURY VERDICT.

A Writ of Certiorari to the Supreme Court of the United States is not a matter of right, but one of judicial discretion, which will be granted "only for compelling reasons". *Rules of the Supreme Court of the United States*, Rule 10. The Court will rarely exercise its discretion in this regard when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. *Id.* Rather, the Court considers "compelling reasons" to include (1) the entry of a decision which is in conflict with another Court of Appeals decision on the same important matter; (2) a Court of Appeals decision on a federal question which conflicts with a decision by the State Court of last resort; or (3) a decision which so far departs from the accepted and usual course of judicial proceedings as to call for the extraordinary exercise of the Supreme Court's jurisdiction. Rule 10.

A review of the Petition before this Court shows an abject lack of factual or legal foundation for the exercise of this Court's discretion. Petitioners, unhappy with the jury verdict and Appellate Court factual findings, have attempted to frame a novel legal issue where none exists. The facts of this case do not approximate those in *Lucas, supra.* except to the extent that beachfront property is involved. If, as suggested by Justice Scalia's dictum in a footnote in *Lucas*, the Supreme Court has not yet decided how to delineate the "property interest" to be valued in an inverse condemnation case, this is clearly not the case to address that issue.

Petitioners rely exclusively on Justice Scalia's footnote in *Lucas* as support for the assertion that this Court has never provided guidance on the "delineation of property interest against which the loss of value is to be measured in an inverse condemnation case". This is a misstatement of the legal issue before the Third Circuit. As recognized by the Appellate Court in this case, *Penn Central, supra* does indeed provide the relevant standard for delineating the property interest; the Third Circuit notes only that "*Penn Central's* expansive conception of the relevant parcel was criticized in *dictum* in the Court's decision in *Lucas*" (Appendix A page 9a). Therefore, it is not that this case presents a novel issue of first impression. Rather, Petitioners do not agree with valid on-point precedent from the Supreme Court, and the Third Circuit's application of that precedent to the particular facts of this case.

Although *Lucas* provides a general analysis of takings jurisprudence, it neither departs drastically from traditional takings law nor applies particularly to the facts of this case. In this case, Petitioners purchased two contiguous lots in 1961, one with an "up and down" duplex residence, the other an unimproved beach lot. The duplex was purchased with the intention of providing direct visual and physical access to the ocean from the fronting beachfront lot. Indeed, it is this precious location that affords the duplex its substantial rental income (from one of the two units) as well as its inherent appraised value of nearly $800,000. Nevertheless, when Petitioners became aware of certain municipal regulations prohibiting building on the beach, they attempted to segregate out as a discreet parcel the contiguous beachfront lot which inherently benefitted the upland duplex residence.

Comparing these specific facts to those in *Lucas*, this case is so clearly distinguishable as to make other Supreme Court takings cases much more relevant and applicable. In the late

1970's David Lucas and others began extensive residential development of the Isle of Palms, a barrier island situated eastward of the City of Charleston in South Carolina. Toward the close of the development cycle for one residential subdivision Lucas, in 1986, purchased two residential lots for $975,000, intending to build single family homes. The undisputed facts showed that Lucas' intention with respect to the lots "was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences". *Ibid.*

In 1988 the South Carolina Legislature enacted the Beachfront Management Act which barred Lucas from erecting any permanent habitable structures on the two parcels. It is within this factual framework that the United States Supreme Court ultimately found a compensable taking of property. Comparing the facts of *Lucas* to those before the Court, it is clear that *Lucas* offers little in terms of on-point precedent. David Lucas had developed property in the area for eighteen years before the State zoned two particular lots into inutility. When Lucas purchased the two lots for $975,000, then, he clearly had a legitimate and reasonable expectation that he would be able to continue his pattern of development. Owners of parcels ***immediately adjacent*** to his had built single family residences. There was no confusion as to what Lucas intended to do, or why he paid nearly a million dollars for the subject parcels.

The Storers, on the other hand, negotiated the purchase of a duplex residence in 1961. They did not even know of the existence of a lot to the east. Their realtor urged them to purchase the lot **in order to preserve the value of the residence**. If they did not purchase the subject lot, someone else might, and then **they would no longer have beachfront property**. The Storers were not developers. They had no expectation or interest in building on the lot. In fact, in 1961 they had no access to the lot and therefore knew it was not buildable. Their realtor told them

that Wesley Avenue would someday be improved, thereby giving them access to the lot. They never investigated the claim further. There were no homes on adjacent lots to the north or south of the sand dune which comprises the subject property. To this date, Wesley Avenue has not been improved, and the duplex on Lot 9 is worth nearly $800,000.

David Lucas paid $975,000 for two lots which were not related in any way to any other parcels and which were zoned into inutility. The Storers, as part of a "package", purchased an entire parcel for $50,000 as reflected in the single deed of conveyance. The beach lot was informally allocated $10,000 of the total purchase price. The critical distinctions between *Lucas* and the present matter are obvious: David Lucas had reasonable investment backed expectations for the property, and the subject regulations denied him **all beneficial use** of the land; the Storers, to the contrary, had **no** expectations for the property — in fact, they did not even know the subject lot existed when they sought to purchase the residence. If an expectation grew with negotiations, it was that the beachfront lot would enhance the value of the duplex, and if Wesley Avenue was ever improved there was a possibility of construction.

David Lucas was a developer and had, in fact, been developing the area of sixteen years prior to purchasing his lots. The Storers wanted a home and ended up buying the subject lot to preserve their beachfront view and access. The downstairs duplex unit grosses $13,000 per year in rent and the entire property where the duplex is located is assessed at $792,000. Clearly, the Storers still have quite valuable "beachfront property" in part ironically, because no building can occur on the beachfront in Ocean City. Therefore, if indeed Justice Scalia's footnote/dictum in *Lucas* merits resolution of a larger question, this is not the case the Court should choose to do so.

Petitioner attempts to assert that "numerous" Courts of Appeals have "struggled" with the issue of delineation of property rights for purposes of determining whether a compensable takings has occurred. Of the four cases cited, one has already been denied certiorari to this Court, one is factual inapposite, and two set forth principles fully consistent with the Court of Appeals in this case. Clearly, there is no "struggle" in this area of the law. Further, as more fully set forth below, this Court has amply defined the measure of the "whole parcel" approach to value in inverse condemnation cases.

Petitioner first cites *Naegele Outdoor Advertising Inc. v. City of Durham,* 844 F.2d 172 (4th Cir. 1988). Respondent would respectfully point out that Petitioner did not set forth the complete citation of this case, which shows clearly that the Petition for Writ of Certiorari in *Naegele* was denied at 115 S. Ct. 317, 130 L. Ed. 2d 278 (1994). Further, *Naegele* involved a billboard ordinance in reference to a major outdoor advertising company and presented issues of prematurity and factual incompleteness in the record. Thus, *Naegele* is of no support to Petitioners in an effort to have certiorari granted in this case. However, the appellate court in *Naegele* cited and relied upon *Penn Central, supra.* for the "whole parcel" approach to determination of property affected:

> **"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole — here the city tax block designated as the "landmark site".**

Naegele, supra, 844 F.2d 172 at 176 *citing Penn Central, supra,* 438 U.S. 104, 130-31.

Thus the appellate court in *Naegele* did not "struggle" with any issue regarding delineation of property rights, but appropriately relied on the *Penn Central* standard, which remains good and appropriate precedent, as did the Third Circuit in this case.

Petitioner's reliance on *Furey v. The City of Sacramento,* 780 F.2d 1448 (9th Cir. 1986) is similarly misplaced. That case involved a very fact specific inquiry as to whether the government-compelled sewer assessment could constitute a takings. If anything, both *Furey* and *Naegele,* while factually inapplicable, support the generally accepted principal that each takings case must be determined through an "ad hoc, factual inquiry". *Naegele, supra,* 844 F.2d at 174.

Clajon Production Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995) (Petitioner's brief, page 13) may be factually inapplicable, but is also supportive of Respondent's position that there is no "compelling need" to grant certiorari in this case. *Clajon* involved a challenge to Wyoming's hunting regulations as violative of Equal Protection and the Commerce Clause by plaintiffs who were ranchers offering hunting services to out-of-state residences. Plaintiffs argued that the complete evisceration of a "single stick in the bundle of property rights", that is, the right to hunt on one's property, could constitute a taking. *Id.,* 70 F.2d at 1577. Again citing and relying on *Penn Central, supra.,* the Court of Appeals held that **"the relevant denominator must be derived from the entire bundle of rights associated with the parcel of land"**. *Ibid.* This outright rejection of the "single stick" approach asserted in other cases has been summarily rejected in favor of the traditional *Penn Central* analysis involving the "whole bundle" of property rights. *See e.g.,*

Marshall v. Rhodes, 912 F. Supp. 1456 (U.S.D.C. Wyoming 1996); *Concrete Pipe & Prods v. Construction Laborers Pension Trust*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993).

Finally, *American Sav. & Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir. 1981) provides no support for Petitioner's application. In that case, the Court of Appeals reversed the District Court's finding of summary judgment, and remanded for further factual inquiry on the single versus whole parcel issue. This case again cites and relies upon *Penn Central* in guiding the lower court's future inquiry, and reiterates that each case must be determined by an ad hoc factual inquiry on a complete record.

The factual inquiry on the complete record in this case shows without dispute that the Petitioners purchased a "whole bundle" of property rights when they took title to Lots 9 and 1 in 1961, in one deed of conveyance and a singular transfer. The "whole parcel" approach is well established in takings jurisprudence. Petitioners have attempted to create a legal quagmire where none exists. There is no "compelling reason" for granting certiorari in this case.

II.

THE COURT OF APPEALS CORRECTLY APPLIED THE "PARCEL AS A WHOLE" RULE SET OUT IN *PENN CENTRAL* AND THERE IS NO REASON TO EXERCISE THIS COURT'S DISCRETION TO REVIEW THE CORRECT APPLICATION OF THIS LAW.

As observed by the United States Supreme Court in *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F. 2d 707 (3d Cir. 1985), *aff'd*, 480 U.S. 470, 107 S. Ct. 1232 (1987) and *Andrus v. Allard*, 444 U.S. 51, 62 L. Ed. 2d 210, 100 S. Ct. 318 (1979), takings jurisprudence has always focused on the nature

and extent of interference with rights in the whole parcel, not discrete segments. In *Andrus, supra.* the Court noted that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."

The test for a regulatory taking requires the Court to compare the value that has been taken from the property with the value that remains in the property. *Keystone, supra,* 480 U.S. at 497. One of the critical questions, then, is determining how to define the unit of property "whose value is to furnish the denominator of the fraction". *Id.* In *Penn Central, supra,* the Court explained:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights ***in the parcel as a whole,*** 438 U.S. at 130-131, 57 L. Ed. 2d 631, 98 S. Ct. 2646

(Emphasis Supplied).

This "whole parcel" as opposed to "discreet segments" approach has been endorsed and followed by the New Jersey Supreme Court. *See Bernardsville Quarry Inc. v. Borough of Bernardsville,* 129 N.J. 221, 608 A.2d 1377 (1992); *Gardner v. New Jersey Pinelands Comm'n,* 125 N.J. 193, 593 A.2d 251 (1991). This fact is important to the issue as framed by Petitioner, as Justice Scalia invites review of a State's Supreme Court

decision on "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Lucas*, 112 S. Ct. at 2893 n. 7, 120 L. Ed. 2d at 813, 814 n.7.

The "whole parcel" theory of a property denominator is not conceptually difficult and in fact is quite consonant with takings jurisprudence which has consistently examined a claimant's "bundle of rights" as opposed to a "single stick". Petitioners cannot reasonably argue with the well established principal that they cannot segregate their property into discreet parcels, and be compensated for an alleged taking of a "single stick" in the bundle. This was the argument proffered by plaintiffs in *Clajon* and summarily rejected. Thus, the Third Circuit correctly analyzed the legal issue in terms of well established takings jurisprudence. There is no reason to disturb the application of the law in the court below.

III.

THE THIRD CIRCUIT CORRECTLY APPLIED THE FACTS OF THIS CASE TO THE APPROPRIATE LAW AND ITS FACTUAL ANALYSIS SHOULD NOT BE DISTURBED.

The Petition before this Court does not address the specific facts of this case but attempts to frame a legal argument in order to overturn an adverse jury verdict. The law requires, however, a specific "ad hoc factual inquiry" into each takings case in order to determine if the owner has been deprived of "all economically beneficially use". The first part of this analysis requires a determination of the parcel allegedly affected by municipal regulation. In this case, the jury was asked first to determine whether the Storers had "reasonable investment-backed

expectations" for the subject property. The jury found no such expectations and the Third Circuit appropriately concluded that this finding could well be based on and supported by the facts of this case.

Implicit in the jury's finding of no "reasonable investment-backed expectations" is the conclusion that Lots 9 and 1 were a contiguous "whole parcel". As pointed out by the court's opinion, "a finding that Lots 1 and 9 were discrete properties would have inevitably led to a finding that a taking had occurred" because it was undisputed that there could be no development of Lot 1. Therefore, although this jury was not asked at the outset to define the "whole parcel" affected, it clearly understood that Petitioners had one "bundle" of property rights — Lot 9, consisting of a very valuable duplex residence, and Lot 1, which protected and enhanced the value of that property. Dr. Storer testified that he would never have sought compensation if he had not found, some eighteen years after purchase, that there could be no development on Lot 1. Petitioners purchased Lots 9 and 1 concurrently in one deed, by one conveyance, and clearly derived benefit from the beachfront parcel (Lot 1) which gave Petitioners' access to the beach and an unobstructed view of the ocean, a property asset which the jury clearly considered both valuable and inextricably related to the whole of Petitioners' property.

So compelling was the factual record in this case that the Third Circuit concluded that the jury would have found, in any event, that Lots 9 and 1 were one parcel. The initial jury finding is in fact completely consistent with this conclusion. Thus there was no reason for the Third Circuit to overturn the jury's finding that no compensable taking had occurred. Had the jury considered Lot 1 a discrete and separate parcel, it would have been forced to consider the denial of "all economically beneficial use" to that particular parcel. The overwhelming

evidence at trial, however, showed what this jury concluded as the truth: Petitioners purchased two contiguous lots in one transfer, with Lot 1 wholly related to the use, enjoyment, and value of Lot 9. A tax line delineation, segregating lots and parcels for the municipality's purposes, is *not* the test for conceptualizing a "whole parcel". Rather, *Penn Central* instructs courts to conceptualize beyond artificial lines and boundaries to focus **"on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole"**. *Penn Central,* 438 U.S. 130-31, 98 S. Ct. at 2662.

Respondent respectfully submits that the legal "issue" raised by this Petition is illusory. With a mandate to engage in an extensive "ad hoc factual inquiry" and with guidance from *Penn Central,* courts can and do make factual determinations as to what constitutes the "bundle" of property rights as opposed to a single "stick". If Justice Scalia's concern in *Lucas* needs amplification at some point in time, this is clearly not the case where the Court would undertake such an analysis. Both the jury, implicitly, and the Third Circuit explicitly found that the Storers purchased two lots as one "whole parcel" which brought with it a "bundle of rights". A property owner cannot assert a right to compensation for an individual part of a whole parcel.

The factual underpinnings of the jury verdict as well as the Third Circuit's conclusions are valid and should not be disturbed. There is no "compelling reason" for granting certiorari in this case.

CONCLUSION

Petitioners have not met their burden of showing compelling reasons for this Court to exercise its discretion. The decision of the Third Circuit was consistent with other Appellate Court decisions, as well as numerous Supreme Court cases. The application of the appropriate law to the specific facts of this case clearly support both the jury verdict and the Appellate Court's affirmance. For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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